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Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

AGENCIA LA ESPERANZA CORPORATION, INC.,

Petitioner,

v.

ORANGE COUNTY BOARD OF SUPERVISORS and ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTION PRESENTED

May a local government avoid the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions (including "impact" fees) by legislative enactment?

LIST OF ALL PARTIES

Petitioner: Agencia La Esperanza Corporation, Inc.

Respondents: Orange County Board of Supervisors and Orange County Public Facilities and Resources Department.

CORPORATE DISCLOSURE STATEMENT

Petitioner Agencia La Esperanza Corporation, Inc., is a privately held corporation. There is no parent corporation; there are no subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 2

A. Factual Background 2

B. Judicial Proceedings 4

REASONS FOR GRANTING THE WRIT 6

I. THE LOWER COURTS ARE SPLIT ON WHETHER *DOLAN*'S "ROUGH PROPORTIONALITY" STANDARD APPLIES WHEN EXACTIONS ARE IMPOSED, NOT ON AN INDIVIDUAL AND DISCRETIONARY BASIS, BUT INSTEAD BY LEGISLATIVE ACTION 6

A. Many State Courts and Two Lower Federal Courts Balance the Benefits and Burdens of Regulation by Applying *Dolan*'s Middle Level of Scrutiny to Legislatively Imposed Exactions 7

B. Other Courts Refuse to Apply *Dolan*'s "Rough Proportionality" Test to Legislatively Imposed Exactions 11

TABLE OF CONTENTS—Continued

Page

II. WHETHER CONSTITUTIONAL TAKINGS STANDARDS APPLY TO LEGISLATIVELY IMPOSED EXACTIONS PRESENTS AN IMPORTANT QUESTION OF REGULATORY TAKINGS LAW 15

III. THE MANNER BY WHICH GOVERNMENT TAKES PRIVATE PROPERTY SHOULD NOT DICTATE THE CONSTITUTIONAL TEST APPLIED TO A REGULATORY TAKINGS CASE .. 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980) 15

Armstrong v. United States, 364 U.S. 40 (1960) 18-19

City of Portsmouth v. Schlesinger, 57 F.3d 12 (1st Cir. 1995) 10

Dolan v. City of Tigard, 512 U.S. 374 (1994) ..... passim

Ehrlich v. City of Culver City, 911 P.2d 429 (Cal.), *cert. denied*, 519 U.S. 929 (1996) ... 5, 11-12, 20

Home Builders Association of Central Arizona v. City of Scottsdale, 930 P.2d 993 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997) 12

Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000) 7

Krupp v. Breckenridge Sanitation District, 19 P.3d 687 (Colo. 2001) 11

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) 8-9, 14, 17, 19

National Association of Home Builders of the United States v. Chesterfield County, 907 F. Supp. 166 (E.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 18838 (4th Cir. 1996) 9-10

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) ..... passim

Northern Illinois Home Builders Association, Inc. v. County of Du Page, 649 N.E.2d 384 (Ill. 1995) 7-8

TABLE OF AUTHORITIES—Continued

Page

Parking Association of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) 13-14

Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922) 15

Pioneer Trust & Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961) 8

Rogers Machinery, Inc. v. Washington County, 45 P.3d 966 (Or. Ct. App.), *petition for review to the Supreme Court of Oregon denied*, 52 P.3d 1057 (Or. 2002) 11-12, 21

San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87 (Cal. 2002) 11-12, 21

Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County, 968 P.2d 993 (Cal.), *cert. denied*, 526 U.S. 1131 (1999) 11

Schultz v. City of Grants Pass, 884 P.2d 569 (Or. 1994) 11-12

Southeast Cass Water Resource District v. Burlington Northern Railroad Company, 527 N.W.2d 884 (N.D. 1995) 12-13

Trimen Development Co. v. King County, 877 P.2d 187 (Wash. 1994) 9

United States Constitution

Amend. V 2, 9, 15, 17, 19

Amend. XIV, § 1 2

TABLE OF AUTHORITIES—Continued

Page

Statutes

28 U.S.C. § 1257(a) 1

Gov't Code § 66000, *et seq* 5

§ 66001 ..... 2, 5

Supreme Court Rule

Rule 13 1

Miscellaneous

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TABLE OF AUTHORITIES—Continued

Page

Institute of Transportation Engineers, *Trip Generation* (6th ed. 1997) 2

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PETITION FOR WRIT OF CERTIORARI

Agencia La Esperanza Corporation, Inc. (Esperanza) respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal.

OPINIONS BELOW

The final unreported opinion of the California Court of Appeal is reproduced as Appendix A to this petition. The Court of Appeal's unreported order denying a petition for rehearing and modifying the opinion is reproduced as Appendix B. The California Supreme Court's denial of review is not reported; it appears at Appendix C to the petition. The Judgment of the superior court is unreported and is reproduced as Appendix D. Finally, the Notice of Entry of Judgment from the superior court is reproduced as Appendix E.

JURISDICTION

The opinion of the California Court of Appeal was filed on April 24, 2002. Rehearing was denied and the opinion was modified by an order filed on May 22, 2002. The order of the California Supreme Court denying Esperanza's Petition for Review was filed July 10, 2002. This petition is timely under Supreme Court Rule 13. On September 27, Justice O'Connor granted Petitioner's timely application to extend the time within which to file the petition to and including October 23, 2002. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

California Government Code Section 66001, as amended by the statutes of 1996, chapter 569, Section 1, entitled, "Procedure in action establishing or increasing fee as condition of approval by local agency," is set out in Appendix F to this petition.

STATEMENT OF THE CASE

A. Factual Background

Agencia La Esperanza Corporation (Esperanza) built a 110,414-square-foot self-storage facility[1] in Orange County, California. A condition for approval of building permits to construct the project required that Esperanza pay transportation mitigation fees assessed under various fee programs, including two Orange County programs—the Moulton Parkway/Laguna Niguel Area (Moulton Parkway) and Coastal Area Road Improvement and Traffic Signals (Coastal Area) fee programs (jointly, Fee Programs). Fees collected under the Moulton Parkway fee program finance road improvements to arterial

[1] The Institute of Transportation Engineers refers to self-storage facilities as mini-warehouses and defines them as buildings in which a number of storage units or vaults are rented for the storage of goods. *See* Institute of Transportation Engineers, *Trip Generation* (6th ed. 1997).

highways in South Orange County, and fees from the Coastal Area fee program finance the construction of specific road, intersection, and traffic signal improvements in the coastal area of unincorporated Orange County.

The amount of the fees imposed on new development are based on general factors that do not account for differences in traffic generation rates for various types of commercial development. The fees are calculated based on the use (residential or nonresidential), the gross square footage, and the area of benefit as defined in the Fee Programs. So commercial, nonresidential development projects, such as Esperanza's self-storage facility, are assessed at the same amount per square foot as all other nonresidential uses in the same area of benefit. The Fee Programs do not account for the fact that self-storage facilities have significantly less impact on local transportation systems than most other types of commercial development.

Neither Esperanza nor Orange County conducted a site-specific traffic study to determine the impact of the project. But Esperanza presented evidence—undisputed by the County—of national and local trip generation rates of self-storage facilities and other types of commercial development. That evidence included national trip generation rates published by the Institute of Transportation Engineers, a source commonly relied upon by traffic engineers. The Institute's traffic generation calculations, applied to the facts of this case, demonstrate the complete lack of proportionality between the fees paid by Esperanza and the impact of the project on local transportation systems. Esperanza's project generates about 276 trips per day. A slightly larger medical clinic[2] (112,000 square feet) generates as many as 3,522 trips per day, and a much smaller medical-dental

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[2] Clinic is defined by the Institute of Transportation Engineers as a facility which provides limited diagnostic and outpatient care, but does not provide prolonged in-house medical and surgical care.

building[3] (45,000 square feet) generates approximately 1,626 trips per day. Yet, under the Fee Programs, Esperanza must pay the same fee per square foot as a medical clinic and a medical-dental office. Thus, under the Moulton Parkway fee program, Esperanza is forced to pay approximately $220 per trip generated. But a clinic would pay only $17.49 per trip and a medical-dental office would pay only $15.22 per trip.

Similarly, under the Coastal Area fee program, the nonresidential fee assessed against Esperanza's facility equals slightly more than $486 per trip. In contrast, a medical clinic would pay approximately $38.64 per trip, and a medical-dental office would pay $33.63.

B. Judicial Proceedings

After unsuccessfully appealing the amount of the transportation mitigation fees to the Orange County Public Facilities and Resources Department and the Orange County Board of Supervisors, Esperanza filed a petition for writ of mandate and complaint in the Orange County Superior Court. Esperanza contended that "the current fee scheme violates a variety of constitutional, statutory and case laws." Appendix at A-2. Esperanza's central argument was twofold. First the fee structure "amounts to an unconstitutional taking because the amount of the fees is unrelated to the volume of traffic the project generates." *Id.* at A-2 to A-3. And second, the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is the proper test for determining the constitutionality of the relationship between the imposed fees and the project's impact. *Id.* at A-3 to A-4.

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[3] A medical-dental office building is defined by the Institute of Transportation Engineers as a facility which provides diagnoses and outpatient care, does not provide prolonged in-house medical and surgical care, and is generally operated by one or more private physicians or dentists.

Esperanza challenged the sufficiency of the relationship of the development fees and the effects attributable to its development project under provisions of the Mitigation Fee Act, California Government Code Section 66000, *et seq*. *See Ehrlich v. City of Culver City*, 911 P.2d 429, 438 (Cal.), *cert. denied*, 519 U.S. 929 (1996) ("[D]evelopers who wish to challenge a development fee on either statutory or constitutional grounds must do so via the statutory framework provided by the Act."). The case was tried by the court on stipulated facts, on January 21, 2000. The next month, the trial court ruled for the County. The Fourth District Court of Appeal, Division Three, affirmed the trial court's decision.

As the court of appeal observed, Esperanza raised a number of "federal constitutional claims" in the trial court and on appeal. Appendix A at A-2, A-5 to A-6. Among these were the argument that the federal Takings Clause—particularly as interpreted by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan*—demands that "heightened scrutiny" be applied as "the appropriate standard for judicial review of the fees imposed on [Esperanza's] project by the County." *Id.* at A-3 to A-4. The lower court rejected this federal constitutional argument on the authority of *Ehrlich*'s crabbed interpretation of the Takings Clause. *See id.* at A-4 to A-5. The court held that *Dolan*'s rough proportionality test does not apply to the exaction imposed on Esperanza's project for the sole reason that the exaction was imposed via legislation. *Id.* at A-4.[4] To challenge this ruling, Esperanza timely files this petition for certiorari.

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[4] The California Supreme Court denied review. Appendix C.

REASONS FOR GRANTING THE WRIT

On an important question of regulatory takings law, the court below issued a decision that is in conflict with the decisions of other lower courts, both state and federal. This conflict warrants resolution by this Court.

I

THE LOWER COURTS ARE SPLIT ON WHETHER *DOLAN*'S "ROUGH PROPORTIONALITY" STANDARD APPLIES WHEN EXACTIONS ARE IMPOSED, NOT ON AN INDIVIDUAL AND DISCRETIONARY BASIS, BUT INSTEAD BY LEGISLATIVE ACTION

Legal scholars describe a "nationwide split of authority" on the question of *Dolan*'s applicability to legislatively adopted exactions (*see, e.g.*, Faus, Richard Duane, *Exactions, Impact Fees, and Dedications—Local Government Responses to* Nollan/Dolan *Takings Law Issues*, 29 Stetson L. Rev. 675, 704 (2000)), and point out the confusion and inconsistency created by a legislative/adjudicative distinction (*see, e.g.*, Reznik, Inna, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 251 (2000)).

As described above, the lower court in this case concluded that the "rough proportionality" standard of *Dolan* does not apply to legislatively enacted exactions. Some state courts agree. But other state courts and two lower federal courts refuse to let the method by which exactions are imposed dictate the constitutional test to be applied in a regulatory takings case.

A. Many State Courts and Two Lower Federal Courts Balance the Benefits and Burdens of Regulation by Applying *Dolan*'s Middle Level of Scrutiny to Legislatively Imposed Exactions

Ohio: In *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353 (Ohio 2000) (*Beavercreek*), the Ohio Supreme Court considered the constitutionality of an ordinance that established "a system of impact fees payable by developers of real estate to aid in the cost of new roadway projects." Specifically, the court considered the developers' assertion that "the ordinance produced an illegal taking of property without just compensation in violation of the United States and Ohio Constitutions." *Id.* at 354.

Noting that courts in other states "have formulated several tests that can be applied in evaluating a Takings Clause challenge to an impact fee ordinance," *id.* at 355, the Ohio court explicitly adopted the test "based on the *Nollan* and *Dolan* cases," *id.* at 356. Like *Nollan* and *Dolan*, the "dual rational nexus test" adopted by the Ohio court for impact-fee ordinances applies a "middle level of scrutiny" that considers whether there is a "reasonable connection" between needs and projected growth and between expenditures and benefits. *Id.* at 355-56. *Cf. Dolan*, 512 U.S. at 390 (noting the "intermediate position" of many courts that required a municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development); *id.* at 391 (adopting that middle level of scrutiny as "the federal constitutional norm" but relabeling it "rough proportionality" to avoid confusion of terms).

Illinois: In *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995), the Home Builders Association argued that state enabling statutes and county ordinances imposing transportation impact fees on new development "violate the takings clauses of the fifth

amendment of the United States Constitution and . . . the Illinois Constitution." *Id.* at 388. The Illinois Supreme Court relied on this Court's takings jurisprudence, including *Nollan* and *Dolan*, to establish the minimum level of protection due under the Takings Clause. *Id.* at 388-89. The court noted the variety of tests applied by courts in other states to examine the relationship between demanded exactions and the projected impact of new development. *Id.* at 389 (citing *Dolan*, 512 U.S. at 389-90). Ultimately, the Illinois court applied a more exacting standard of scrutiny than is required by *Dolan*—the "specifically and uniquely attributable" standard it had developed earlier in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961). *Northern Illinois Home Builders*, 649 N.E.2d at 389.[5] Like *Dolan*, the "specifically and uniquely attributable" test requires that local government demonstrate proportionality—albeit a direct proportionality—between an exaction imposed on new development and the specifically created need for additional traffic. *Id.* at 389-90. *See Dolan*, 512 U.S. at 389-90.

New York: The New York Court of Appeals struck down a legislatively enacted rent stabilization ordinance as an unconstitutional taking in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995). The court described the holdings of several of this Court's constitutional takings decisions, *id.* at 481-83, including *Dolan*, and explained that "[w]e are governed by this framework and discern no analytical basis or precedential authority to drop below this floor of constitutional protection for property owners," *id.* at 482. The rent stabilization ordinance did not pass constitutional scrutiny because it allowed an "indeterminate and unjustifiable burden [to be]

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[5] *See Dolan*, 512 U.S. at 389-90, wherein this Court discussed, but did not adopt, the *Pioneer Trust* standard.

draped disproportionately on the particular [apartment] owners' shoulders." *Id.* at 483.

Washington: *Trimen Development Co. v. King County*, 877 P.2d 187, 191 (Wash. 1994), is a Washington Supreme Court case challenging in lieu of dedication fees assessed pursuant to a King County Council ordinance. The court upheld the fees after deciding that the amount of the exaction was "reasonably necessary" to provide for the increased need for park land and open space created by Trimen's subdivisions. *Id.* at 194. Specifically, the court concluded that "the fees imposed in lieu of dedication were reasonably necessary as a direct result of Trimen's proposed development. *See Dolan v. Tigard* ('rough proportionality' between required dedication and impact of proposed development)." *Id.* (citations omitted).

United States District Court for the Eastern District of Virginia: In *National Association of Home Builders of the United States v. Chesterfield County*, 907 F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 18838 (4th Cir. 1996), the district court upheld a Chesterfield County Policy adopted to guide the county's acceptance of proffers allowed by an earlier-adopted ordinance. The money from the proffers was to be used to offset the increased cost of specific capital improvements necessitated by proposed residential developments. *Id.* at 168-69. The policy, applicable to all residential rezoning requests, established a method for calculating the maximum proffer that could be tendered with a rezoning application. *Id.* at 168.

The Home Builders asserted that, on its face, the proffer policy "violates the Fifth Amendment to the United States Constitution's prohibition on taking of property without just compensation." *Id.* at 167. The court upheld the policy because

> there is no reason apparent on the face of the Policy why the proffers required, if any, can not [be]

> determined in an "individualized" manner and fixed at an amount "roughly proportional" in "nature and extent to the impact of the proposed development" according to the test set out in *Dolan v. Tigard.*

Id. at 169.

First Circuit: *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), involved a challenge to a low-income housing fee imposed when the owner of the site of some low-income apartments sought permission to replace the apartments with new condominiums. *Id.* at 12-13. The developers negotiated with city authorities to obtain a zoning change, and those negotiations resulted in several draft ordinances. *Id.* at 13. The draft ordinance ultimately approved by the city planning board provided for a payment or impact fee "designed to compensate the City for the impact upon it expected to result from the loss of low income housing." *Id.* at 12-13. And the parties negotiated more impact fees to be paid to the city by the developers in accordance with the terms of a promissory note. *Id.* at 13.

The challenge to the fees was burdened with a statute of limitations issue that dominated the opinion, but the court noted that undisputed facts showed that "no rational nexus existed between the amount of the Developers' . . . [fee] and any burden imposed on the City due to the zoning change." *Id.* at 14. The court uses the term "rational nexus" as a *Dolan*-style assessment of the relationship between the amount of a fee and the burdens imposed on a municipality by the development. "The district court . . . went on to find factually that no rational nexus existed here as between the $2,500,000 payment sought by the City and any demonstrable burden to be borne by it due to the zoning change." *Id.* at 13.

B. Other Courts Refuse to Apply *Dolan*'s "Rough Proportionality" Test to Legislatively Imposed Exactions

California: The California Supreme Court applies the *Nollan* and *Dolan* tests to monetary exactions imposed on an individual and discretionary basis (*Ehrlich v. City of Culver City*, 911 P.2d at 444), but will not apply the same standard to exactions imposed by generally applicable legislation. *See, e.g.*, *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 102-04 (Cal. 2002), and *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 968 P.2d 993, 1001-02 (Cal.), *cert. denied*, 526 U.S. 1131 (1999). The court reasons that heightened scrutiny does not apply to exactions in the form of generally applicable development fees, because "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present." *Ehrlich*, 911 P.2d at 444.

Colorado: In *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001), the Colorado Supreme Court refused to apply *Dolan*'s rough proportionality standard to a sanitation district fee imposed on a residential townhouse project. The court adopted a very narrow interpretation of *Nollan* and *Dolan* that limits application of the nexus and rough proportionality tests to a narrow set of cases involving property exactions and discretionary adjudicative determinations specific to one landowner and one parcel of land. *Id.* at 695-97. "One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system." *Id.* at 696.

Oregon: In *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 967, 982 (Or. Ct. App.), *petition for review to the Supreme Court of Oregon denied*, 52 P.3d 1057 (Or. 2002), where a business challenged the constitutionality of

a traffic impact fee assessed on a development pursuant to a county ordinance, the Oregon Court of Appeals determined that legislatively imposed and calculated development fees are not subject to *Dolan*.[6] The court agreed with the California Supreme Court's contention in *Ehrlich* and *San Remo Hotel* that *Dolan* only applies "with the sort of governmental leveraging that can arise in case-by-case adjudicatory imposition of development conditions." *Id.* at 982. The court does apply *Dolan*'s standard of heightened scrutiny to legislatively authorized dedications of property. *Schultz v. City of Grants Pass*, 884 P.2d 569, 572-73 (Or. 1994). The contradiction between *Schultz* and *Rogers Machinery* was explained as follows: "[W]e appear to have suggested that there were significant discretionary aspects to the land use decision [in *Schultz*]." *Rogers Machinery*, 45 P.3d at 979.

Arizona: The Arizona Supreme Court upheld a water resources fee assessed on new development in *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997). The court said that *Dolan* did not apply to the fee because the fee resulted from "a generally applicable *legislative* decision," which does not involve the same risk of regulatory leveraging that occurs when a landowner must bargain for approval of a particular use of land. *Id.* at 1000.

North Dakota: Burlington Northern Railroad Company challenged a requirement that it modify and maintain drains, bridges, and culverts to accommodate increased water flow resulting from drain improvements made by the Southeast Cass Water Resource District. *Southeast Cass Water Resource District v. Burlington Northern Railroad Company*, 527 N.W.2d 884, 885 (N.D. 1995). The Supreme Court of North Dakota distinguished the facts of *Dolan* by explaining that

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[6] Rogers Machinery will seek review by this Court.

Burlington Northern's duty "arises not from a municipal 'adjudicative decision to condition,' but rather from an express and general legislated duty under a constitutional reservation of police power over a corporation." *Id.* at 896.

Georgia: In *Parking Association of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995), the owners and managers of surface parking lots challenged the constitutionality of an ordinance requiring the addition of barrier curbs, landscaping areas, ground cover, and trees to existing lots in several zoning districts. The court said that plaintiffs' reliance on *Dolan* was misplaced because, unlike Mrs. Dolan, the plaintiffs were not required to deed portions of their property to the city and the required exaction was the result of a legislative determination affecting many landowners. *Id.* at 203.[7]

This Court denied certiorari. But Justices Thomas and O'Connor dissented "[b]ecause the petition poses a substantial federal question concerning regulatory takings and because there is confusion in the lower courts." *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. at 1116 (Thomas, J., dissenting from denial of certiorari). The dissenting justices expressly questioned the wisdom of treating legislative enactments with special deference.

> It is hardly surprising that some courts have applied *Tigard*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the

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[7] Three Georgia Supreme Court justices dissented, urging application of a multi-factored "benefit-extraction" analysis based primarily on the *Nollan* "close nexus" and *Dolan* "rough proportionality" tests to determine whether an exaction is an expense that in fairness and justice should be paid for by the public as a whole. *Id.* at 204.

> taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id.

Almost eight years after *Parking Association of Georgia* was decided, the lower courts remain hopelessly divided on how to interpret the governing precedents and principles when faced with a takings challenge to legislatively imposed exactions. The author of the majority opinion in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, expressed frustration with the split within that court.

> The differing views of the members of the Court in this case derive principally from varying interpretations of governing precedents. As to [one] dissenting opinion, the difference is essentially one of application, but as to [the other], it is a profound difference from the majority as to the understanding and interpretation of what the many governing precedents say and mean.

Id. at 482-83.

Only this Court can resolve the conflict in the state and lower federal courts.

II

WHETHER CONSTITUTIONAL TAKINGS STANDARDS APPLY TO LEGISLATIVELY IMPOSED EXACTIONS PRESENTS AN IMPORTANT QUESTION OF REGULATORY TAKINGS LAW

The Fifth Amendment to the United States Constitution provides in relevant part that private property shall not "be taken for public use without just compensation." The Takings Clause protects individual property owners from government actions that impact arbitrarily and unevenly on isolated individuals. *See* Huffman, James L., *Colloquium on* Dolan v. City of Tigard: *The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 145 (1995). Justice Holmes wrote that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 415 (1922).

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court said that regulation goes "too far" when it fails to substantially advance a legitimate government interest or denies all economically viable use of property. Regulation fails to substantially advance a legitimate government interest if there is no "nexus" between a permit condition and the public purpose requiring the condition. *Nollan*, 483 U.S. at 837. Government regulation in *Nollan* took the form of an exaction—the California Coastal Commission imposed a condition requiring the property owner to dedicate a strip of beach in order to obtain a permit to rebuild his house. *Id.* at 827-28. This Court held that there must be a nexus between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner's property. *Id.* at 837. Without such a connection, a

permit condition is "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* (citations omitted).

Seven years later, in *Dolan v. City of Tigard*, 512 U.S. 374, this Court defined how close a "fit" is required between the burdens imposed by a development exaction and the burdens created by a proposed development plan. Where a nexus is found, there must also be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—"some sort of individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development." *Id.* at 391 (emphasis added).

A development exaction is a demand that a property owner give up something of value as a condition of obtaining government approval to build on property. An exaction can take the form of land, an interest in land, or money. *See* Burling, James S., *Development Fees and the Supreme Court's Takings Jurisprudence: A Close Fit?*, ALI-ABA Course of Study Materials, Inverse Condemnation and Related Government Liability (1996). And exactions can be imposed on an individual and discretionary basis or by legislation of general applicability. Regardless of their form or source, the requirement that exactions have a nexus and are subject to "rough proportionality" is perfectly sensible and effective to insulate landowners from overreaching governmental entities that might otherwise take unfair advantage of persons during the application process.

Esperanza did not dispute the existence of a connection or nexus between the traffic mitigation fees imposed on its project and the County's desire to accommodate increased traffic on local transportation systems. Rather, Esperanza argued that the connection was legally insufficient—the amount of the fees has no relationship to the impact of the development on local

transportation systems. The court below ruled that legislatively imposed land use exactions, because they are legislatively imposed, can evade the searching judicial inquiry of *Dolan*. But there is "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application [of *Dolan*] only to administrative or quasi-judicial acts of government regulators." Callies, David L., *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 Stetson L. Rev. 523, 567-68 (1999).

The Fifth Amendment itself does not distinguish between kinds of property that may be taken or the manner by which property is taken. U.S. Const. amend. V. And some courts and legal scholars conclude that *Nollan* and *Dolan* show this Court's intent to set out principles for all property and land use regulation matters. *See, e.g., Manocherian v. Lenox Hill Hospital*, 643 N.E.2d at 483 ("[T]he Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the 'essential nexus' test."); and Callies, *supra*, at 567 (The *Nollan* and *Dolan* decisions involved property dedications, but the nexus and proportionality rules are of more universal application.).

Significantly, both *Nollan* and *Dolan* involved a mixture of legislative and adjudicative government action.[8] In *Nollan*, this Court, responding to Justice Brennan's dissent, noted the Coastal Commission's "public announcement of its intention to condition the rebuilding of houses on the transfer of easements." 483 U.S. at 833 n.2. In other words, just as in the present case, the Coastal Commission's statewide exaction policy was applied on a uniform and consistent basis. The

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[8] The blending of legislative, administrative, and judicial functions is common in land use decisionmaking. *See* Reznik, *supra*, at 257-66.

statutory requirement in *Dolan* that landowners contribute to transportation infrastructure was also generally applicable and was adopted through legislative action. *Dolan*, 512 U.S. at 378 (noting that the community development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways").

Legislatively imposed exactions have become an increasingly popular method of funding local projects, and a manageable and predictable test would benefit both property owners and government. The artificial distinction between fees imposed by legislative acts and those imposed by quasi-adjudicative acts does not further the Takings Clause's substantive protection of private property. And, as demonstrated by the facts of this case, the existence of a nexus is not sufficient, "or else a minimal public burden or insignificant need created by the project could justify a massive exaction." Burling, *supra*, at 103.

III

THE MANNER BY WHICH GOVERNMENT TAKES PRIVATE PROPERTY SHOULD NOT DICTATE THE CONSTITUTIONAL TEST APPLIED TO A REGULATORY TAKINGS CASE

The choice of some lower courts to apply different constitutional tests based on whether an exaction is imposed by legislative enactment or quasi-adjudicative administrative decision ignores the policy problems *Nollan* and *Dolan* were intended to resolve. The close nexus and rough proportionality tests formulated by those cases seek to prevent coercive and unfair government behavior when a property owner seeks government's permission to use property in a particular way.

In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court explained that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just

compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The requirements of a nexus and rough proportionality provide a means to ensure that the purpose of the Fifth Amendment is fulfilled. *See, e.g.*, *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (The New York Court of Appeals noted that a rent stabilization ordinance transferred significant, distinctive, apartment ownership prerogatives to Lenox Hill Hospital without its having to endure the burdens and costs of ownership. *Id.* at 481. The court concluded that the ordinance failed the constitutional test because it created an "indeterminate and unjustifiable burden draped disproportionately on the particular owners' shoulders." *Id.* at 483.). *See also* Huffman, *supra*, at 150 ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure." *Id.* at 152.).

Legal scholars argue that neither the Fifth Amendment nor the takings precedents support a legislative/adjudicative distinction between exactions, and those scholars urge an integrated doctrine that recognizes the constitutional equivalency of all exactions. *See* Huffman, *supra*, at 150 (Dean Huffman acknowledges the important procedural implications of a legislative/adjudicative distinction, but goes on to say that "it is not at all clear that the distinction should have any relevance with respect to the substantive protection of property rights. From the point of view of the property owner, the consequence of a taking is the same whether done by the legislative, executive, or judicial branches of government. The Fifth Amendment draws no such distinction."). *See also* Callies, *supra*, at 575 (Land development conditions require a legitimate state interest, nexus and proportionality. "These rules extend to exactions beyond physical dedications even

though *Nollan* and *Dolan* were land dedication cases. . . . Why should a common legislative scheme of conditions escape scrutiny if it lacks either nexus or proportionality? An unconnected or disproportionate condition is extortionate, regardless." *Id.*).

Those courts that distinguish between legislative and adjudicative exactions claim that when exactions are imposed in the form of generally applicable legislation, property owners do not encounter the heightened risk of extortionate use of the government's police power to impose unconstitutional exactions. *See, e.g., Ehrlich v. City of Culver City*, 911 P.2d at 444. Legal scholars disagree. *See* Reznik, *supra*, at 251 ("The extortion and inequitable economic burdens that local governments potentially impose on landowners through administrative processes can occur just as easily in the legislative context." *Id.* at 267.); Huffman, *supra*, at 146 (Government is reluctant to compensate property owners impacted by regulation. And, "[t]he drafters of the takings clause understood that we should expect nothing different from government. Absent judicial enforcement of the takings clause, governments have every incentive to take private property without compensation. Democracy will deter such wealth redistribution only when large numbers of people are likely to bear the costs. The takings clause exists, along with the rest of the Bill of Rights, because the constitutional framers understood the inevitability of the tyranny of the majority in an unlimited democracy." *Id.*).

One commentator argues that local legislative bodies acting in their legislative capacity may be more likely to use the police power to exact unconstitutional conditions than in the adjudicative setting. Reznik, *supra*, at 270-72. Indeed, it is highly probable that grossly disproportionate exactions will result from broadly applicable, generalized exaction programs. Those types of programs do not allow government to consider

widely varying individual circumstances, and do not provide a means to accommodate those who do not fit within a program's general categories. The facts of this case provide a good example of the kind of disproportionate fee that can result when there is no opportunity for an individual to say, "I'm different."

Parties to adjudicative proceedings have significant procedural rights that may enhance equal treatment for competing interests. Reznik, *supra*, at 273. But the only safeguard against legislatively imposed extortionate exactions is found in the political process. The California Supreme Court said that

> [w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election.

San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d at 105. *See Rogers Machinery v. Washington County*, 45 P.3d at 982, wherein the Court of Appeals of Oregon cited the quoted language.

While the democratic political process may, as the California Supreme Court suggested, protect against "extortionate fees for all property development," it is doubtful that the political process would work as efficiently to remove government officials who impose extortionate fees on only some forms of property development. Developers are exactly the kind of minority whose interests might be ignored by the majority. And they are oftentimes not local and thus are unable to participate in the local political process. *See* Reznik, *supra*,

at 271-72. The Takings Clause is intended to protect against that sort of majoritarian oppression.

The use of arbitrary distinctions to apply a less exacting standard of review to legislatively imposed exactions can result in grossly disproportionate exactions, as it did in this case. Local governments will prefer to utilize their legislative power to impose exactions if such exactions are not subject to the same exacting standard as applies to adjudicative exactions.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: October, 2002.

Respectfully submitted,

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TABLE OF CONTENTS

A. Opinion of the California Court of Appeal, Fourth Appellate District, Division Three (April 24, 2002)

B. Order Denying Rehearing and Modifying Opinion; No Change in Judgment, from the California Court of Appeal, Fourth Appellate District, Division Three (May 22, 2002)

C. Order from the Supreme Court of California (July 10, 2002)

D. Judgment from the Superior Court of California, County of Orange (February 28, 2000)

E. Notice of Entry of Judgment from the Superior Court of California, County of Orange (March 9, 2000)

F. California Government Code section 66001 (2001)

FILED APR. 24, 2002

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL FOR
THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

AGENCIA LA ESPERANZA CORPORATION, INC.,	G027288
Plaintiff and Appellant,	(Super. Ct. No. 777514)
v.	OPINION
ORANGE COUNTY BOARD OF SUPERVISORS et al.,	
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, Richard M. Aronson, Judge. Affirmed.

Pacific Legal Foundation, James S. Burling, and Meriem L. Hubbard for Plaintiff and Appellant.

Laurence M. Watson, County Counsel, Thomas C. Agin, Assistant County Counsel, and Nicholas S. Chrisos, Deputy County Counsel for Defendants and Respondents.

* * *

To obtain approval and building permits, Orange County developers of nonresidential buildings are required to pay development fees based on the square footage of their projects. Arguing that this fee calculation methodology does not adequately link the fee amount to the impact of the developments on the county's infrastructure, a self-storage facility developer sued to have the fees assessed on its project reduced, contending the current fee scheme violates a variety of constitutional, statutory and case laws.[1] Concluding the developer's arguments are without merit, we affirm.

I. Background

In January 1997, the Orange County Environmental Management Agency approved Agencia La Esperanza's (Esperanza) plans to build a 110,414 square foot self-storage facility in Aliso Viejo. Building permits were issued in June 1997 but were conditioned upon Esperanza paying development fees totaling $60,727 assessed under the Moulton Parkway/Laguna Niguel Area and Coastal Area Road Improvement and Traffic Signals fee programs. Like those on the vast majority of nonresidential development projects undertaken in Orange County, the fees were calculated based on te square footage of the project. These onetime fees are designed to mitigate the traffic impact of such developments on the affected surrounding area. While Esperanza paid the fees and has now completed the project, it sued the Orange County Board of Supervisors and the Orange County Public Facilities and Resources Department (County), contending the fee structure violates the requirements of Government Code section 66000 et seq. (the Mitigation Fee Act) and amounts to an

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[1] Now also on appeal are *Extra Space of Laguna Hills v. San Joaquin Hills Transportation Corridor Agency* (G028469) and *Extra Space of Laguna Hills v. City of San Clemente* (G027806), cases involving similar facts and legal issues.

unconstitutional taking because the amount of the fees is unrelated to the volume of traffic the project generates. In its petition for writ of mandate and complaint, Esperanza sought to have the County enjoined from continuing to assess development fees in an unlawful manner, sought a declaratory judgment to permit the County to adjust development fees on an individual basis, sought injunctive relief to prevent the County from continuing to refuse to reduce development fees, claimed the County was in violation of Government Code sections 66001, subdivision (b) and 66005, and contended that the fees assessed by the County were an unapproved special tax and amounted to a violation of its civil rights.

Following a bench trial based on stipulated facts, judgment was entered against Esperanza on all allegations in February 2000. A request for statement of decision was denied as not timely filed. This appeal followed.

II. Discussion

The crux of Esperanza's appeal is a single question: what is the appropriate standard by which a court is to assess the reasonableness of the relationship between the fees imposed on a development project and that project's impact on the affected community? Government code section 66001, subdivision (b) specifically states "[i]n any action imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." Here, Esperanza contends not only that there is no reasonable relationship between the fees assessed on their projects and the projects impact on the affected surrounding areas, but also that heightened scrutiny, as delineated in the line of cases following *Nolan v. California Coastal Com'n* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374,

is the appropriate standard for judicial review of the fees imposed on its project by the County.

As noted by our Supreme Court in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, California law draws no distinction between the physical taking and the imposition of fees, but, contrary to Esperanza's contention, limits the application of heightened scrutiny to land use cases "exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation." (*Id.* at p. 868.) More specifically, the *Ehrlich* court observed that where the monetary exactions are imposed "neither generally nor ministerially, but on an individual and discretionary basis, . . . the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered." (*Id.* at p. 876.) Here, the calculation of development fees, imprecise as it may be, is applied uniformly, generally, and ministerially. As a result, heightened scrutiny is not triggered.[2]

Esperanza make much out of what it perceives as the fundamental unfairness of a system that ties project fees to square footage. It contends that case-by-case analysis of each development project by the county would more precisely allocate development costs among projects based on the volume of traffic each is projected to generate based on its intended use. While such a system would likely shift infrastructure development costs among various projects, it would also, without providing any increase in overall revenue, significantly increase the cost to the County of reviewing and analyzing each set of plans submitted for approval.

---

[2] The parties stipulated that the fee computation for the self-storage facilities projects included three factors: the anticipated use (single-family unit, multifamily unit or nonresidential), the gross square footage or number of units, and the area of benefit as defined in the fee program (for example, the Moultan Parkway fee program.).

Imperfect as the current method of assessing development fees and allocating the costs local infrastructure development may be, the *Ehrlich* court specifically noted that "no 'precise mathematical calculation is required'" provided the County "'make[s] some effort to quantify its findings in support of the dedication [or monetary exaction].'" (*Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th at p. 873.)

Here, the County has adopted an approach that assesses fees in a general and consistent manner based on a reasonable relationship between the development project and the fees assessed. What's more, because the fee is assessed only when the initial building permit is issued—and only an increase in square footage (regardless of changes in usage) would trigger an assessment of additional development fees—the initial fee assessment is the County's only opportunity to recoup the costs of meeting the affected area's infrastructure needs. As a result, we conclude the trial court did not err when it found that the County's method of allocating development fees is acceptable under the terms of the Mitigation Fee Act, and is not subject to heightened scrutiny under the guidelines detailed in *Ehrlich*.

Esperanza further contends that the Legislature's 1996 modification to the Government Code subsequent to Ehrlich changes the standard of review of development fees from rational basis to heightened scrutiny. We disagree with this interpretation. The applicable 1996 amendment merely broadened the definition of "fee" in Government Code section 66000 to include both monetary exactions imposed uniformly or on an ad hoc basis. As the County notes in its respondent's brief, neither the revised statutory language nor the legislative history regarding the 1996 amendment indicates the Legislature sought to modify the judicial standard of review of such fees.

Esperanza also raises a collection of state and federal constitutional claims on appeal. These contentions, including deprivation of substantive due process and equal protection, and

illegal imposition of special taxes, are without merit because they are premised on the erroneous assumption that the County's method of allocating development fees is "irrational, arbitrary and discriminatory." As we have noted, the County's fee allocation methodology is none of these. While large nonresidential projects are assessed proportionally greater development fees than are smaller nonresidential ones, the fees are assessed in a uniform and consistent manner which is roughly proportional to the burden each project imposes on the surrounding infrastructure. As a result, we conclude the trial court did not err in rejection Esperanza's various constitutional arguments. The judgment is affirmed. The County shall recover its costs on appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.

Appendix B–1

FILED MAY 22, 2002

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

AGENCIA LA ESPERANZA CORPORATION, INC.,	)	G027288
	)	(Super. Ct. No. 777514)
Plaintiff and Appellant,	)	
	)	ORDER DENYING
v.	)	REHEARING AND
	)	MODIFYING
ORANGE COUNTY BOARD OF SUPERVISORS et al.,	)	OPINION; NO CHANGE IN
	)	JUDGMENT
Defendants and Respondents.	)	

The petition for rehearing is DENIED.

The opinion is modified as follows. On page 2 of the slip opinion, strike the second sentence in the section entitled "I. Background" and replace it with the following sentence:

"Building permits were issued in June 1997 but were conditioned upon Esperanza paying development fees of $60,727 assessed under the Moulton Parkway/Laguna Niguel

Area program and $134,153 assessed under the Coastal Area Road Improvement and Traffic Signals fee program."

The modification does not change the judgment.

SILLS, PJ.
SILLS, P.J.

WE CONCUR:

RYLAARSDAM, J.
RYLAARSDAM, J.

BEDSWORTH, J.
BEDSWORTH, J.

Appendix C–1

FILED JULY 10, 2002

Court of Appeal, Fourth Appellate District, Division Three - No. G027288

S107268

IN THE SUPREME COURT OF CALIFORNIA

En Banc

AGENCIA LA ESPERANZA CORPORATION,
Plaintiff and Appellant,
v.
ORANGE COUNTY BOARD OF SUPERVISORS et al.,
Defendants and Respondents.

Petition for review DENIED.

Brown, J., was absent and did not participate.

GEORGE
Chief Justice

FILED FEB. 28, 2000

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Exempt from Filing Fees Pursuant to Gov't Code § 6103

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE,
CENTRAL JUSTICE CENTER

AGENCIA LA ESPERANZA CORPORATION, INC.,	Case No.: 77-75-14
Plaintiff and Petitioner,	ASSIGNED FOR ALL PURPOSES TO JUDGE RICHARD M. ARONSON DEPARTMENT C27
v.	
ORANGE COUNTY BOARD OF SUPERVISORS; ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT; and DOES 1 through 50,	~~(PROPOSED)~~ **JUDGMENT**
Defendants and Respondents.	

This cause came on for trial on a written stipulation of facts on January 21, 2000, in Department C27 of the above-entitled court, the Honorable Richard M. Aronson, Judge, presiding. The court sat without a jury, a jury having been duly waived. Counsel for each party filed written points and authorities. Plaintiff/Petitioner appeared by its attorney, Ronald Zumbrun. Defendants/Respondents appeared by their attorney, Laurence M. Watson, County Counsel, by Nicholas S. Chrisos, Deputy. No statement of decision has been timely requested.

Having considered the evidence, and oral and written statements of counsel, and being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that

1. Plaintiff/Petitioner's Petition for Writ of Mandate is denied;

2. Plaintiff/Petitioner's Request for Declaratory Relief is denied;

3. Plaintiff/Petitioners's Request for Injunctive Relief is denied;

4. Plaintiff/Petitioner shall take nothing by reason of its complaint/petition herein;

5. Defendant shall recover its costs.

Dated: FEB 28 2000

RICHARD M. ARONSON
Judge of the Superior Court

FILED MAR. 09, 2000

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE,
CENTRAL JUSTICE CENTER

AGENCIA LA ESPERANZA CORPORATION, INC.,	Case No.: 77-75-14
Plaintiff and Petitioner,	ASSIGNED FOR ALL PURPOSES TO JUDGE RICHARD M. ARONSON DEPARTMENT C27
v.	
ORANGE COUNTY BOARD OF SUPERVISORS; ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT; and DOES 1 through 50,	**NOTICE OF ENTRY OF JUDGMENT**
Defendants and Respondents.	

Appendix E–2

TO Plaintiff/Petitioner AGENCIA LA ESPERANZA CORPORATION, INC. and to its attorney of record, Ronald Zumbrun of the Zumbrun Law Firm:

NOTICE IS HEREBY GIVEN that on February 28, 2000, judgment was entered in the above-entitled action in favor of Defendants/Respondents ORANGE COUNTY BOARD OF SUPERVISORS and ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT and against Plaintiff/Petitioner AGENCIA LA ESPERANZA CORPORATION, INC.

DATED: March 9, 2000 LAURENCE M. WATSON, COUNTY COUNSEL
THOMAS C. AGIN, ASSISTANT and NICHOLAS S. CHRISOS, DEPUTY

By /s/ Nicholas S. Chrisos
Nicholas S. Chrisos, Deputy

Attorneys for Defendants and Respondents

Appendix F–1

DEERING'S CALIFORNIA CODES ANNOTATED
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*** THIS SECTION IS CURRENT THROUGH THE 2002 SUPPLEMENT (2001 SESSION) ***
INCLUDING URGENCY LEGISLATION THROUGH 2002 REG. SESS. CH. 201, 7/22/02 AND 2001-2002 3RD EXTRA SESS. CH. 4XXX, 5/06/02

GOVERNMENT CODE

TITLE 7. Planning and Land Use

DIVISION 1. Planning and Zoning

CHAPTER 5. Fees For Development Projects

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Cal Gov Code § 66001 (2001)

§ 66001. Procedure in action establishing or increasing fee as condition of approval by local agency

(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall do all of the following:

(1) Identify the purpose of the fee.

(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to

a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

(b) In any action imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to Section 66006.

(d) For the fifth fiscal year following the first deposit into the account or fund, and every five years thereafter, the local agency shall make all of the following findings with respect to that portion of the account or fund remaining unexpended, whether committed or uncommitted:

(1) Identify the purpose to which the fee is to be put.

(2) Demonstrate a reasonable relationship between the fee and the purpose for which it is charged.

(3) Identify all sources and amounts of funding anticipated to complete financing in incomplete improvements identified in paragraph (2) of subdivision (a).

(4) Designate the approximate dates on which the funding referred to in paragraph (3) is expected to be deposited into the appropriate account or fund.

When findings are required by this subdivision, they shall be made in connection with the public information required by subdivision (b) of Section 66006. The findings required by this subdivision need only be made for moneys in possession of the local agency, and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date. If the findings are not made as required by this subdivision, the local agency shall refund the moneys in the account or fund as provided in subdivision (e).

(e) Except as provided in subdivision (f), when sufficient funds have been collected, as determined pursuant to subparagraph (F) of paragraph (1) of subdivision (b) of Section 66006, to complete financing on incomplete public improvements identified in paragraph (2) of subdivision (a), and the public improvements remain incomplete, the local agency shall identify, within 180 days of the determination that sufficient funds have been collected, an approximate date by which the construction of the public improvement will be commenced, or shall refund to the then current record owner or owners of the lots or units, as identified on the last equalized assessment roll, of the development project or projects on a prorated basis, the unexpended portion of the fee, and any interest accrued thereon. By means consistent with the intent of this section, a local agency may refund the unexpended revenues by direct payment, by providing a temporary suspension of fees, or by any other reasonable means. The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.

(f) If the administrative costs of refunding unexpended revenues pursuant to subdivision (e) exceed the amount to be

refunded, the local agency, after a public hearing, notice of which has been published pursuant to Section 6061 and posted in three prominent places within the area of the development project, may determine that the revenues shall be allocated for some other purpose for which fees are collected subject to this chapter and which serves the project on which the fee was originally imposed.

HISTORY: Added Stats 1987 ch 927 § 1, operative January 1, 1989. Amended Stats 1988 ch 418 § 8; Stats 1996 ch 569 § 1 (SB 1693).